



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 2A**

**THE UNCITRAL MODEL LAWS RELATING TO INSOLVENCY**

Commented [SL1]: TOTAL = 44.5

89%

*This is the summative (formal) assessment for Module 2A of this course and is compulsory for all candidates who selected this module as one of their compulsory modules from Module 2. Please read instruction 6.1 on the next page very carefully.*

*If you selected this module as one of your elective modules, please read instruction 6.2 on the next page very carefully.*

The mark awarded for this assessment will determine your final mark for Module 2A. *In order to pass this module, you need to obtain a mark of 50% or more for this assessment.*

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. **You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
2. **All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
3. **No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
4. **You must save this document using the following format: [student ID.assessment2A]. An example would be something along the following lines: 202223-336.assessment2A. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. **Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 **If you selected Module 2A as one of your compulsory modules (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is 23:00 (11 pm) GMT on 1 March 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 6.2 **If you selected Module 2A as one of your elective modules (see the e-mail that was sent to you when your place on the course was confirmed), you have a choice as to when you may submit this assessment. You may either submit the assessment by 23:00 (11 pm) GMT on 1 March 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not**

***submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).***

- 7. Prior to being populated with your answers, this assessment consists of 14 pages.***

**ANSWER ALL THE QUESTIONS**

Please note that all references to the "MLCBI" or "Model Law" in this assessment are references to the Model Law on Cross-Border Insolvency.

**QUESTION 1 (multiple-choice questions) [10 marks in total]**

Commented [SL2]: SUBTOTAL = 9 MARKS

Questions 1.1 - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Which of the following statements does not reflect the purpose of the Model Law?

- (a) The purpose of the Model Law is to provide greater legal certainty for trade and investment.
- (b) The purpose of the Model Law is to provide protection and maximization of the value of the debtor's assets.
- (c) The purpose of the Model Law is to facilitate the rescue of a financially troubled business, by providing a substantive unification of insolvency law.**
- (d) The purpose of the Model Law is to provide a fair and efficient administration of cross-border insolvencies that protects all creditors and the debtor

Question 1.2

Commented [SL3]: Correct answer is (d).

Which of the following statements are reasons for the development of the Model Law?

- (a) The increased risk of fraud due to the interconnected world.
- (b) The difficulty of agreeing multilateral treaties dealing with insolvency law.**
- (c) The practical problems caused by the disharmony among national laws governing cross-border insolvencies, despite the success of protocols in practice.

**(d) All of the above.**

Question 1.3

**Which of the following challenges to a recognition application under the Model Law is most likely to be successful?**

- (a) The registered office of the debtor is not in the jurisdiction where the foreign proceedings were opened, but the debtor has an establishment in the jurisdiction of the enacting State.**
- (b) The registered office of the debtor is in the jurisdiction of the enacting State, but the debtor has an establishment in the jurisdiction where the foreign proceedings were opened.**
- (c) The debtor has neither its COMI nor an establishment in the jurisdiction where the foreign proceedings were opened.**
- (d) The debtor has neither its COMI nor an establishment in the jurisdiction of the enacting State.**

Question 1.4

**Which of the following rules or concepts set forth in the Model Law ensures that fundamental principles of law are upheld?**

- (a) The *locus standi*/access rules.**
- (b) The public policy exception.**
- (c) The safe conduct rule.**
- (d) The "hotchpot" rule.**

Question 1.5

**For a debtor with its COMI in South Africa and an establishment in Argentina, foreign main proceedings are opened in South Africa and foreign non-main proceedings are opened in Argentina. Both the South African foreign representative and the Argentinian foreign representative have applied for recognition before the relevant court in the UK. Please note that South Africa has implemented the Model Law subject to the so-called principle of reciprocity (based on country designation), Argentina has not implemented the Model Law and the UK has implemented the Model Law without any so-called principle of reciprocity. In this scenario, which of the following statements is the most correct one?**

*(a) The foreign main proceedings in South Africa will not be recognised in the UK because the UK is not a designated country under South Africa's principle of reciprocity, but the foreign non-main proceedings in Argentina will be recognised in the UK despite Argentina not having implemented the Model Law.*

*(b) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will not be recognised in the UK because the UK has no principle of reciprocity and Argentina has not implemented the Model Law.*

*(c) Both the foreign main proceedings in South Africa and the foreign non-main proceedings in Argentina will be recognised in the UK.*

*(d) None of the statements in (a), (b) or (c) are correct.*

Question 1.6

*Which of the following statements regarding concurrent proceedings under the Model Law is true?*

*(a) No interim relief based on Article 19 of the Model Law is available if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.*

*(b) In the case of a foreign main proceeding, automatic relief under Article 20 of the Model Law applies if concurrent domestic insolvency proceedings and foreign proceedings exist at the time of the application of the foreign proceedings in the enacting State.*

*(c) The commencement of domestic insolvency proceedings prevents or terminates the recognition of a foreign proceeding.*

*(d) If only after recognition of the foreign proceedings concurrent domestic insolvency proceedings are opened, then any post-recognition relief granted based on Article 21 of the Model Law will not be either adjusted or terminated if consistent with the domestic insolvency proceedings.*

Question 1.7

*When using its discretionary power to grant post-recognition relief pursuant to Article 21 of the Model Law, what should the court in the enacting State primarily consider?*

*(a) The court must be satisfied that the interests of the creditors and other interested parties, excluding the debtor, are adequately protected.*

**(b) The court should consider whether the relief requested is necessary for the protection of the assets of the debtor or the interests of the creditors and strike an appropriate balance between the relief that may be granted and the persons that may be affected.**

**(c) The court should be satisfied that the foreign proceeding is a main proceeding.**

**(d) All of the above.**

Question 1.8

**Which of the statements below regarding the Centre of Main Interest (COMI) and the Model Law is correct?**

**(a) COMI is not a defined term in the Model Law.**

**(b) For a corporate debtor, the Model Law does contain a rebuttable presumption that the debtor's registered office is its COMI.**

**(c) For an individual debtor, the Model Law does contain a rebuttable presumption that the debtor's habitual residence is its COMI.**

**(d) All of the above.**

Question 1.9

**An automatic stay of execution according to article 20 in the Model Law covers:**

**(a) Court proceedings.**

**(b) Arbitral Tribunals.**

**(c) Both (a) and (b).**

**(d) Neither (a) nor (b).**

Question 1.10

**Article 13 grants access to the creditors in a foreign proceeding. Which of the following statements correctly describes the protection granted in Article 13?**

**(a) A foreign creditor has the same rights regarding the commencement of, and participation in, a proceeding as creditors in this State.**

**(b) A foreign creditor has the same rights as it has in its home state.**

(c) All foreign creditors' claims are, as a minimum, considered to be unsecured claims.

(d) Article 13 contains a uniform ranking system to avoid discrimination.

QUESTION 2 (direct questions) [10 marks in total]

Commented [SL4]: SUBTOTAL = 10 MARKS

Question 2.1 [maximum 3 marks]

Commented [SL5]: 3 marks

**Under the MLCBI, explain and discuss what the appropriate date is for determining the COMI of a debtor?**

Article 17 of the MLCBI, paragraph 2(a), provides that upon deciding to recognise a foreign proceeding, the foreign proceeding shall be recognised as a "foreign main proceeding" if it is taking place in the State where the debtor has its centre of main interests (COMI). This aligns with the definition of "foreign main proceeding" in Article 2(b).

The wording of Article 17 would suggest by "is taking place" that the time for determining the COMI of the debtor is the time that the application for recognition is granted. However, while the MLCBI does not expressly designate the appropriate date for determining the COMI of the debtor, the appropriate date for determining the debtor's COMI is considered to be the date on which the foreign proceeding that is sought to be recognised in the enacting state was commenced.

The UNCITRAL Guide to Enactment, at paragraph 145, states that the principal factors which indicate the debtor's COMI are the location a) where the central administration of the debtor takes place and b) which is readily ascertainable by creditors. These factors are such that it would be quite an undertaking, though not impossible, to move the COMI between the commencement of the foreign proceeding and the application for recognition.

Paragraph 159 of the UNCITRAL Guide to Enactment suggests that having regard to the evidence that is required to accompany an application for recognition under Article 15 of the MLCBI, and the relevance that is accorded to the decision commencing the foreign proceeding and appointing the foreign representative, the date of commencement of that proceeding is the appropriate date. The reasoning for this is that it provides a test that can be applied with certainty to all insolvency proceedings and provide a clear result. There are examples in case law of this approach being followed: *Trustees in bankruptcy of Li Shu Chung v Li Shy Chung* [2021] EWHC 3346 (Ch).

However, there are also examples in case law of an alternative approach being taken. In the US in *Morning Mist Holdings v Krys (Matter of Fairfield Sentry Ltd)* (2<sup>nd</sup> Cir Appeals Apr. 16, 2013) the Second Circuit of Appeals court held that "...a debtor's



*COMI should be determined based on its activities at or around the time the Chapter 15 petition is filed, as the statutory text suggests. But given the EIR and other international interpretations, which focus on the regularity and ascertainability of the debtor's COMI, a court may consider the period between the commencement of the foreign insolvency proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith". By this, the US court meant that the time for determining the COMI was the time the recognition application was filed, but any changes after the foreign proceeding was filed until that time would be considered. This approach was also followed in the UK in *Re Tosia Limited* (judgment unpublished of 29 March 2019 by Catherine Burton).*

*While this alternative approach does appear to follow the wording of Article 17 more closely, the approach that is put forward by the UNCITRAL Guide to Enactment offers more certainty.*

**Question 2.2** [maximum 3 marks]

Commented [SL6]: 3 marks

**The following three (3) statements relate to particular provisions / concepts to be found in the Model Law. Indicate the name of the provision / concept (as well as the relevant Model Law article), addressed in each statement.**

**Statement 1** *"This Article lays down the requirements of notification of creditors."*

**Statement 2** *"This Article is referred to as the 'Safe Conduct Rule'".*

**Statement 3** *"This Article contains a rebuttable presumption in respect of an undefined key concept in the MLCBI."*

*Statement 1 refers to Article 14 of the Model Law, which is named "Notification to foreign creditors of a proceeding under [laws of the enacting State]". The purpose of Article 14 is to ensure that all creditors, whether based in the enacting State or otherwise, are treated equally by being given notice of the recognition proceeding. Article 14.1 gives the court of the enacting State discretion as to whether and how appropriate steps are taken with a view to notifying any creditor whose address is not yet known. Article 14.2 provides the court of the enacting State with discretion as to whether such notifications are made to foreign creditors individually, but does not require letters rogatory or other similar formalities. Article 14.3 provides that when notifications are to be given, they shall indicate a reasonable time period for filing claims and give directions as to the place where claims will be filed, indicate whether secured creditors need to file secured claims, and contain any other information required by the laws of the enacting State and the orders of the court in the enacting State.*

*Statement 2 refers to Article 10 of the Model Law, which is named "Limited jurisdiction", and referred to as the "Safe Conduct Rule". Article 10 provides: "The*

*sole fact that an application pursuant to [the Model Law] is made to a court in [the enacting State] by a foreign representative does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the courts of [the enacting State] for any purpose other than the application."*

The purpose of the "Safe Conduct Rule" in Article 10 is to make sure that the court in the enacting State does not take jurisdiction over all of the debtor's assets simply because the foreign representative has applied to recognise the foreign proceeding in the enacting State.

Statement 3 is a reference to Article 16, which is titled "Presumptions concerning recognition", and is a reference to Article 16.3 in particular. Article 16.3 provides that in the absence of proof to the contrary, the debtor's registered office or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests. The centre of main interests (COMI) is an undefined concept in the Model Law and is a key concept because the location of a debtor's COMI determines whether a foreign proceeding is a foreign main proceeding and therefore whether certain reliefs are automatically applied on recognition pursuant to Article 20.

**Question 2.3 [2 marks]**

Commented [SL7]: 2 marks

**In the IBA case appeal, the English Court of Appeal upheld the decision that the court should not exercise its power to grant the indefinite Moratorium Continuation. Please explain.**

*The IBA case appeal (In the Matter of the OJSC International Bank of Azerbaijan and the CBIR 2006 - Bakshiyeva v Sberbank of Russia, et al [2018] EWCA Civ 2802) concerned an application in England & Wales by an Azeri foreign representative. The foreign insolvency proceedings in Azerbaijan had been recognised in England & Wales under the English Cross-Border Insolvency Regulations 2006, which had adopted the Model Law. The Azeri foreign representative applied under Article 21 of the Model Law for an indefinite continuation of the automatic moratorium that had applied under Article 20 of the Model Law.*

*The reason for the application was that the bank had entered into a voluntary restructuring with its creditors in order to continue as a going concern. That plan was binding on its creditors, including the respondents to the application, whose claims were governed by English law but were not discharged by the restructuring. The automatic stay under Article 20 applied until the restructuring was fully implemented. The application under Article 21 was made to prevent the English creditors from enforcing their rights under English law against the bank's assets in England. At first instance, Mr Justice Hildyard refused to grant the application on the basis that a permanent stay could not be used to get round the so-called Gibbs Rule. The Court of Appeal agreed. The Gibbs Rule comes from *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399 and is a general*

*proposition that a debt governed by English law cannot be either discharged or compromised by a foreign insolvency proceeding, unless it is either a discharge under the law that applies to the contract, or the creditors has submitted to the jurisdiction of the foreign insolvency proceeding.*

*The Court of Appeal in the IBA case considered that the indefinite stay did not satisfy the two conditions in Article 21(1), in that it was not necessary to protect the interests of creditors and that it was not an appropriate way of achieving such protection. Article 21 could not be used to override the creditors' substantive rights under the proper law governing their debts; if such an effect had been intended the Model Law would have made that explicit.*

**Question 2.4 [2 marks]**

Commented [SL8]: 2 marks

***In terms of relief, what should the court in an enacting State, where a domestic proceeding has already been opened in respect of the debtor, do after recognition of a foreign main proceeding? In your answer you should mention the most relevant article of the MLCBI. What (ongoing) duty of information does the foreign representative in the foreign main proceeding have towards the court in the enacting State? Here too you are required to mention the most relevant article of the MLCBI.***

*In an enacting State where a domestic proceeding has already been opened and recognition of a foreign main proceeding is then sought, Article 29(a) provides that after recognition of the foreign main proceeding is granted, the court should ensure that any relief granted under Article 19 or Article 21 of the MLCBI is consistent with the proceeding in the enacting State, and because the foreign proceeding is a foreign main proceeding, the automatic relief provided for in Article 20 does not apply. This maintains the hierarchy that the domestic proceeding is given pre-eminence over the foreign proceeding.*

*In accordance with Article 18 of the MLCBI, the foreign representative in the foreign main proceeding has an ongoing duty from the time of filing the application for recognition of the foreign main proceeding to inform the court in the enacting State "promptly" of any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment, and of any other foreign proceeding regarding the same debtor that becomes known to the foreign representative.*

**QUESTION 3 (essay-type questions) [15 marks in total]**

***A foreign representative of a foreign proceeding opened in State B in respect of a corporate debtor (the Debtor) is considering whether or not to make a recognition application under the implemented Model Law of State A (which does not contain any***

reciprocity provision). In addition, the foreign representative is also considering what (if any) relief may be appropriate to request from the court in State A.

Write a brief essay in which you address the three questions below.

Question 3.1 [maximum 4 marks] [3 out of 4 marks]

Commented [SL9]: SUBTOTAL = 11 MARKS

**The foreign representative is considering his options to secure the value of the debtor's assets located in State A. With reference to the Model Law's provisions on access and co-operation, explain how these rights in State A can benefit the foreign representative.**

*The Model Law's provisions on access are found in Articles 9 to 14. Articles 9, 11 and 12 provide the foreign representative with access to the courts of State A. Article 9 provides that a foreign representative is entitled to apply directly to the court in State A. This would provide the foreign representative with standing in the courts of State A and therefore direct access to those courts without having to obtain recognition of the foreign proceeding opened in State B first, and without having to meet formal requirements such as obtaining a particular licence or going through a consular process first. [1] This means the foreign representative has quick access to the courts in State A. However, Article 9 does not automatically provide the foreign representative with any other rights or powers.*

*Article 11 provides the foreign representative with standing to apply to commence an insolvency proceeding under the laws of State A if the conditions for commencing that proceeding under the law of State A are met. Again this would provide the foreign representative with quick access to opening a domestic proceeding in State A, without having to obtain recognition of the proceeding in State B first. [1] This would enable the foreign representative to open a domestic proceeding in State A to deal with the assets of the debtor that are located there.*

*Article 12 would permit the foreign representative to participate in a domestic proceeding opened in State A that relates to the debtor, but it would not be relevant here as Article 12 requires recognition of the foreign proceeding in State B first.*

*The Model Law's provisions on cooperation are contained in Articles 25 to 27 of the Model Law. These provisions expressly provide the courts of State A with powers to cooperate with the foreign representative in certain situations. Cooperation is not dependent on recognition of the State B foreign proceeding and so the foreign representative can seek the cooperation of the courts of State A without first having to apply for recognition, which means the foreign representative can seek cooperation quickly. [1]*

*Article 25 provides that the court of State A shall cooperate to the maximum extent possible with the foreign representative and that the court is entitled to communicate directly with, or to request information or assistance directly from, the foreign representative. This means that the foreign representative can seek cooperation from*

*the court of State A even if the proceeding in State B is not a foreign main or a foreign non-main proceeding.*

*Article 26 is not relevant here, as it would only be applicable if an insolvency representative had already been appointed in State A pursuant to a domestic proceeding.*

*Article 27 contains a list of the types of cooperation that may be implemented. Those which are listed and may be relevant here include communication of information by any appropriate means, coordination of the administration and supervision of the debtor's assets and affairs, and approval or implementation by the court of State A of agreements concerning the coordination of proceedings.*

***Well answered - for full marks you should have discussed the key benefits of both the access provisions and the cooperation provisions which are time and cost savings which promote value enhancement and avoid value destruction.***

Question 3.2 [maximum 5 marks] [3 out of 5 marks]

***For a recognition application in State A to be successful, the foreign proceeding opened in State B must qualify as a "foreign proceeding" within the meaning of article 2(a) of the MLCBI and the "foreign representative" must qualify as a foreign representative within the meaning of article 2(d) of the MLCBI. Assuming that both qualify as such, list and briefly explain (with reference to the relevant MLCBI articles) any other evidence, restrictions, exclusions and limitations that must be considered, as well as the judicial scrutiny that must be overcome for a recognition application to be successful.***

*In addition to the requirements that the foreign proceeding must be a foreign proceeding within the meaning of Article 2(a) and the foreign representative must be a foreign representative within the meaning of Article 2(d), according to Article 17(1) of the MLCBI, a foreign proceeding shall (subject to Article 6) be recognised if:*

- (a) the application meets the requirements of Article 15(2); and*
- (b) the application is submitted to the court referred to in Article 4, which means the competent court or authority specified in Article 4 in relation to State A.*

*The requirements of Article 15(2) are the documents and evidence which must accompany the application for recognition, being:*

- (a) a certified copy of the decision commencing the foreign proceedings and appointing the foreign representative; or*
- (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or*

(c) in the absence of either (a) or (b) above, any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative. [½]

In accordance with Article 15(3), the application must also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative. In accordance with Article 15(4), the court may require a translation of documents supplied in support of the application for recognition into an official language of State A. [½]

Pursuant to Article 16, the court of State A is entitled to presume that the documents submitted under Article 15 are authentic, whether or not they have been legalised.

As stated above, the decision to recognise a foreign proceeding is subject to Article 6, which contains the public policy exception. This means that the court of State A may refuse to recognise the foreign proceeding if that would be contrary to the public policy of State A. [1]

Article 17(3) provides that the recognition application must be decided at the earliest possible time. Article 17(4) provides that recognition can be modified or even terminated if it is shown that the grounds for granting it were fully or partially lacking or have since ceased to exist. For example, in *Sanko Steamship Co. Ltd* [2015] EWHC 1031 (Ch), the English court dismissed an application seeking the continuation of recognition after the foreign proceeding in Japan had been terminated. - **Article 17 - discussion on COMI and main or non-main proceedings, see below.**

While there is no provision in the MLCBI preventing recognition where the application is an abuse of process, this is left to the enacting State and it will be the procedural laws of State A that determine whether this application constitutes an abuse of process. The foreign representative will have a duty of full and frank disclosure when making the application and if this is breached, depending on the procedural law of State A the recognition application may not be granted. [1] - **reference to Article 6**

**A discussion on the following should have been included:**

1. **Exclusions:** If the debtor is an entity that is subject to a special insolvency regime in State B, the foreign representative should first check if the foreign proceedings regarding that type of a debtor are excluded in State A based on Article 1(2) of the implemented Model Law in State A.
2. **Restrictions: Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should also check if there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the recognition application under the implemented Model Law in State A.
3. **Judicial scrutiny:** While the court in State A is able to rely on the rebuttable presumptions set forth in Article 16 of the Model Law, in the context of Article 17 of the Model Law the court will have to assess whether either the COMI or at least

**an establishment of the debtor is located in State B where the foreign proceedings were opened. If the COMI of the debtor is in State B the foreign proceedings should be recognised as foreign main proceedings and if only an establishment of the debtor is in State B the foreign proceedings should be recognised as foreign non-main proceedings. Without a COMI or at least an establishment of the debtor in State B, recognition cannot be granted by the court in State A.**

- 4. Public policy exception: Finally, the court in State A should also ensure based on Article 6 of the Model Law that the recognition application is not manifestly contrary to public policy of State A.**

Question 3.3 [maximum 5 marks] [4 out of 5 marks]

**As far as relief is concerned, briefly explain (with reference to the relevant MLCBI articles) what pre- and post-recognition relief can be considered in the context of the MLCBI. Also address which restrictions, limitations or conditions should be considered in this context. For the purposes of this question, it can be assumed that there is no concurrence of proceedings.**

*The foreign representative may apply for interim relief under Article 19 of the MLCBI. Applications for interim relief can be made from the time that the application for recognition is filed until the application is decided on. This is therefore urgent pre-recognition relief. Article 19 provides the court of the enacting state with discretion to grant provisional relief including:*

- (a) staying execution against the debtor's assets;*
- (b) entrusting the administration or realisation of all or part of the debtor's assets located in the enacting state to the foreign representative, or to another person designated by the court, where this is in order to protect and preserve the value of assets that are, by their nature or because of other circumstances, perishable, susceptible to devaluation or otherwise in jeopardy; or*
- (c) any relief that is mentioned in paragraph 1 (c), (d) and (g) of Article 21, which include:
  - i. suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor (paragraph 1(c));*
  - ii. providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities (paragraph 1(d)); or*
  - iii. granting any additional relief that may be available to an office holder under the domestic law of the enacting state (paragraph 1(g)).**

*Any relief that is granted under Article 19 terminates when the recognition application is decided upon, unless it is extended in accordance with Article 21 (Article 19(3)).*

*The conditions for granting provisional relief under Article 19 are that either relief is urgently needed to protect the assets of the debtor, or that relief is urgently needed*

*to protect the interests of creditors (Article 19(1)). Further, Article 19(4) provides the enacting state with discretion to refuse to grant relief under Article 19 if such relief would interfere with the administration of a foreign main proceeding.*

*Upon recognition being granted of a foreign proceeding that is specifically a foreign main proceeding, Article 20 provides for automatic effects which include:*

- (a) a stay on commencing or continuing individual actions or individual proceedings in relation to the debtor's assets, rights, obligations or liabilities, though this does not prevent the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor;*
- (b) a stay on execution against the debtor's assets; and*
- (c) suspension of the right to transfer, encumber, or otherwise dispose of any assets of the debtor.*

*Upon the grant of recognition of a foreign proceeding, whether it is a main or non-main foreign proceeding, Article 21 provides the court of the enacting state with discretion, where the foreign representative requests, to grant appropriate relief. As with Article 19, the conditions are that relief must be necessary to protect the assets or the debtor or the interests of creditors.*

*Relief that may be sought under Article 21 includes (to the extent it has not already been dealt with under Article 20 in the case of a foreign main proceeding):*

- (a) a stay on commencing or continuing individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities;*
- (b) a stay on execution against the debtor's assets;*
- (c) a suspension of the right to transfer, encumber, or otherwise dispose of any of the debtor's assets;*
- (d) the examination of witnesses, the taking of evidence, or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;*
- (e) entrusting the administration or realisation of all or part of the debtor's assets located in the enacting state to the foreign representative or another person designated by the court;*
- (f) an extension of any interim relief granted under Article 19; or*
- (g) any additional relief that may be available to a domestic office holder under the domestic law of the enacting state.*

*In accordance with Article 21(2), the foreign representative can request the court to entrust the distribution of all or part of the debtor's assets located in the enacting state to the foreign representative or another person designated by the court. The court has discretion to grant such relief, and must be satisfied that the interests of creditors in the enacting state are adequately protected.*



Before granting any relief under Article 21 in respect of a foreign non-main proceeding, Article 21(3) provides that the court must be satisfied that the relief relates to assets that, under the domestic law of the enacting state, should be administered in the foreign non-main proceeding, or concerns information that is required in that proceeding.

Finally, Article 22 of the MLCBI provides that when granting any relief under Articles 19 or 21, or in modifying or terminating relief under Article 22(3), upon either the request of the foreign representative or of its own motion, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected. The court can also subject any relief granted under Articles 19 or 21 to any conditions it considers are appropriate (Article 22(2)).

**For full marks your answer must include a brief discussion on the following elements:**

- 1. Existing international obligations of State A:** Based on Article 3 of the Model Law, the court in State A should again verify that there are no existing international obligations of State A (under a treaty or otherwise) that may conflict with granting the requested relief under the implemented Model Law in State A.
- 2. Public policy exception:** The court in State A should, based on Article 6 of the Model Law, also again verify that the relief application is not manifestly contrary to public policy of State A.

Question 3.4 [maximum 1 mark] [1 mark]

**Briefly explain - with reference to case law - why a worldwide freezing order granted as pre-recognition interim relief ex article 19 MLCBI, is unlikely to continue post-recognition ex article 21 MLCBI?**

A worldwide freezing order that is granted as pre-recognition relief under Article 19 of the MLCBI is unlikely to be continued post-recognition under Article 21 because Article 21 provides that the court of the enacting state has discretion to grant relief that is available to a domestic office holder under its own domestic legislation and this means that recognition of the foreign proceeding is designed to put the foreign representative in the same position as a domestic office holder.

In the English case of *Igor Vitalievich Protasov v Khadzhi-Murat Derev* [2021] EWHC 392 (Ch), the English High Court was asked to continue a worldwide freezing order that had been granted under Article 19 as provisional relief. The English court held that the English insolvency legislation offered other forms of protection for the foreign representative, which meant that relief in the form of a freezing order was not warranted. The infrastructure of the insolvency regime operated to deprive the debtor of control of his worldwide assets and conferred wide-ranging powers on the office holder, all of which was subject to the general control of the court, whose powers included a power of arrest. As the scheme of the MLCBI was to put the foreign representative in the same position as an office holder appointed under English law,

*the effect of recognition was to bring into play the wide infrastructure of the insolvency legislation in England, and so without an exceptional reason a freezing order was neither required nor justified.*

QUESTION 4 (fact-based application-type question) [15 marks in total]

**Read the following facts very carefully before answering the questions that follow.**

(1) Background

***The Commercial Bank for Business Corporation (the Bank) has operated since 1991. The Bank's registered office is situated in Country A, which has not adopted the MLCBI. As of 13 August 2015, the Bank's majority ultimate beneficial owner was Mr Z, who held approximately 95% of the Bank's shares through various corporate entities (including some registered in England).***

***The Bank entered provisional administration on 17 September 2015 and liquidation on 17 December 2015. Investigations into the Bank have revealed that it appears to have been potentially involved in a multi-million dollar fraud resulting in monies being sent to many overseas companies, including entities incorporated and registered in England.***

***Proceedings were commenced in the High Court of England and Wales (Chancery Division) against various defendants on 11 February 2021 (the English Proceedings).***

***An affidavit (the Affidavit) sets out a detailed summary of the legislation of Country A's specific insolvency procedure for Banks. The procedure involves initial input from the National Bank (the NB) and at the time that the Bank entered liquidation, followed by a number of stages:***

*Classification of the bank as troubled*

***The NB may classify a bank as "troubled" if it meets at least one of the criteria set down by article 75 of the Law of Country A on Banks and Banking Activity (LBBA) or for any of the reasons specified in its regulations.***

***Once declared "troubled", the relevant bank has 180 days within which to bring its activities in line with the NB's requirements. At the end of that period, the NB must either recognise the Bank as compliant, or must classify it as insolvent.***

*Classification of the bank as insolvent*

***The NB is obliged to classify a bank as insolvent if it meets the criteria set out in article 76 of the LBBA, which includes:***

- (i) the bank's regulatory capital amount or standard capital ratios have reduced to one-third of the minimum level specified by law;**
- (ii) within five consecutive working days, the bank has failed to meet 2% or more of its obligations to depositors or creditors; and**
- (iii) the bank, having been declared as troubled, then fails to comply with an order or decision of the NB and / or a request by the NB to remedy violations of the banking law.**

**The NB has the ability to classify a bank as insolvent without necessarily needing to first go through the troubled stage. Article 77 of the LBBA accordingly provides that a bank can be liquidated by the NB directly, revoking its licence.**

#### *Provisional administration*

**The Deposit Guarantee Fund (DGF) is a governmental body of Country A tasked principally with providing deposit insurance to bank depositors in Country A. However, the Affidavit explained that the DGF is also responsible for the process of withdrawing insolvent banks from the market and winding down their operations via liquidation. Its powers include those related to early detection and intervention, and the power to act in a bank's interim or provisional administration and its ultimate liquidation.**

**Pursuant to article 34 of the DGF Law, once a bank has been classified as insolvent, the DGF will begin the process of removing it from the market. This is often achieved with an initial period of provisional administration. During this period:**

- (i) the DGF (acting via an authorised officer) begins the process of directly administering the bank's affairs. Articles 35(5) and 36(1) of the DGF Law provide that during provisional administration, the DGF shall have full and exclusive rights to manage the bank and all powers of the bank's management.**
- (ii) Article 36(5) establishes a moratorium which prevents, *inter alia*: the claims of depositors or creditors being satisfied; execution or enforcement against the bank's assets; encumbrances and restrictions being created over the bank's property; and interest being charged.**

#### *Liquidation*

**Liquidation follows provisional administration. The DGF is obliged to commence liquidation proceedings against a bank on or before the next working day after the NB's decision to revoke the bank's licence.**

**Article 77 of the LBBA provides that the DGF automatically becomes liquidator of a bank on the date it receives confirmation of the NB's decision to revoke the bank's**

**licence. At that point, the DGF acquires the full powers of a liquidator under the law of Country A.**

**When the bank enters liquidation, all powers of the bank's management and control bodies are terminated (as are the provisional administrators' powers if the bank is first in provisional administration); all banking activities are terminated; all money liabilities due to the bank are deemed to become due; and, among other things, the DGF alienates the bank's property and funds. Public encumbrances and restrictions on disposal of bank property are terminated and offsetting of counter-claims is prohibited.**

**As liquidator, the DGF has extensive powers, including the power to investigate the bank's history and bring claims against parties believed to have caused its downfall. Those powers include:**

- (i) the power to exercise management powers and take over management of the property (including the money) of the bank;**
- (ii) the power to compile a register of creditor claims and to seek to satisfy those claims;**
- (iii) the power to take steps to find, identify and recover property belonging to the bank;**
- (iv) the power to dismiss employees and withdraw from/terminate contracts;**
- (v) the power to dispose of the bank's assets; and**
- (vi) the power to exercise "such other powers as are necessary to complete the liquidation of a bank".**

**The DGF also has powers of sale, distribution and the power to bring claims for compensation against persons for harm inflicted on the insolvent bank.**

**However, article 48(3) of the DGF Law empowers the DGF to delegate its powers to an "authorised officer" or "authorised person". The "Fund's authorised person" is defined by article 2(1)(17) of the DGF Law as: "an employee of the Fund, who on behalf of the Fund and within the powers provided for by this Law and / or delegated by the Fund, performs actions to ensure the bank's withdrawal from the market during provisional administration of the insolvent bank and/or bank liquidation".**

**Article 35(1) of the DGF Law specifies that an authorised person, must have: "...high professional and moral qualities, impeccable business reputation, complete higher education in the field of economics, finance or law...and professional experience necessary." An authorised person may not be a creditor of the relevant bank, have a criminal record, have any obligations to the relevant bank, or have any conflict of**

**interest with the bank. Once appointed, the authorised officer is accountable to the DGF for their actions and may exercise the powers delegated to them by the DGF in pursuance of the bank's liquidation.**

**The DGF's independence is addressed at articles 3(3) and 3(7) of the DGF Law which confirm that it is an economically independent institution with separate balance sheet and accounts from the NB and that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers.**

**Article 37 establishes that the DGF (or its authorised person, insofar as such powers are delegated) has extensive powers, including powers to exercise managerial and supervisory powers, to enter into contracts, to restrict or terminate the bank's transactions, and to file property and non-property claims with a court.**

(2) The Bank's liquidation

**The Bank was formally classified by the NB as "troubled" on 19 January 2015. The translated NB resolution records:**

**"The statistical reports-based analysis of the Bank's compliance with the banking law requirements has found that the Bank has been engaged in risky operations."**

**Those operations included:**

- (i) a breach, for eight consecutive reporting periods, of the NB's minimum capital requirements;**
- (ii) 10 months of loss-making activities;**
- (iii) a reduction in its holding of highly liquid assets;**
- (iv) a critically low balance of funds held with the NB; and**
- (v) 48% of the Bank's liabilities being dependent on individuals and a significant increase in "adversely classified assets" which are understood to be loans, whose full repayment has become questionable.**

**Despite initially appearing to improve, by September 2015 the Bank's financial position had deteriorated further with increased losses, a further reduction in regulatory capital and numerous complaints to the NB. On 17 September 2015, the NB classified the Bank as insolvent pursuant to article 76 of the LBBA. On the same day, the DGF passed a resolution commencing the process of withdrawing the Bank from the market and appointing Ms C as interim administrator.**

**Three months later, on 17 December 2015, the NB formally revoked the Bank's banking licence and resolved that it be liquidated. The following day, the DGF initiated the liquidation procedure and appointed Ms C as the first of the DGF's authorised persons to whom powers of the liquidator were delegated. Ms C was replaced as authorised officer with effect from 17 August 2020 by Ms G.**

**Ms G's appointment was pursuant to a Decision of the Executive Board of the Directors of the DGF, No 1513 (Resolution 1513). Resolution 1513 notes that Ms G is a "leading bank liquidation professional". It delegates to her all liquidation powers in respect of the Bank set out in the DGF Law and in particular articles 37, 38, 47-52, 521 and 53 of the DGF Law, including the authority to sign all agreements related to the sale of the bank's assets in the manner prescribed by the DGF Law. Resolution 1513 expressly excludes from Ms G's authority the power to claim damages from a related party of the Bank, the power to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, and the power to arrange for the sale of the Bank's assets. Each of the excluded powers remains vested in the DGF as the Bank's formally appointed liquidator.**

**On 14 December 2020, the Bank's liquidation was extended to an indefinite date, described as arising when circumstances rendered the sale of the Bank's assets and satisfaction of creditor's claims, no longer possible.**

**On 7 September 2020, the DGF resolved to approve an amended list of creditors' claims totalling approximately USD 1.113 billion. The Affidavit states that the Bank's current, estimated deficiency exceeds USD 823 million.**

QUESTION 4.1 [maximum 15 marks] [14.5 out of 15]

**Prior to any determination made in the English Proceedings, Ms G, in her capacity as authorised officer of the Deposit Guarantee Fund (or DGF) of Country A in respect of the liquidation of the Commercial Bank for Business Corporation (the Bank), together with the DGF (the Applicants), applied for recognition of the liquidation of the Bank before the English court based on the Cross-Border Insolvency Regulations 2006 (CBIR), the English adopted version of the MLCBI.**

**Assuming you are the judge in the English court considering this recognition application, you are required to discuss:**

**4.1.1 whether the Bank's liquidation comprises a "foreign proceeding" within the meaning of article 2(a) of the MLCBI [maximum 10 marks]; and [10 out of 10]**

**4.1.2 whether the Applicants fall within the description of "foreign representatives" as defined by article 2(d) of the MLCBI [maximum 5 marks]. [4.5 out of 5]**

While not all facts provided in the fact pattern given for this Question 4 are immediately relevant for your answer, please do use, where appropriate, those relevant facts that directly support your answer.

**For the purpose of this question, you may further assume that the Bank is not excluded from the scope of the MLCBI by article 1(2) of the MLCBI.**

#### **4.1.1**

*As an initial point, the fact that Country A has not adopted the MLCBI does not matter for the purposes of seeking recognition in England under the CBIR, as the CBIR contain no reciprocity requirement.*

*Article 2(a) of the MLCBI provides that a "foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency, in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation.*

*The seven elements to consider are:*

- 1. a proceeding (including an interim proceeding);*
- 2. in a foreign State;*
- 3. that is a collective proceeding;*
- 4. that is judicial or administrative;*
- 5. that is being carried out pursuant to a law relating to insolvency;*
- 6. in which the assets and affairs of the debtor Bank are subject to control or supervision by a foreign court; and*
- 7. the proceeding is for the purpose of reorganisation or liquidation.*

#### *1) A proceeding (including an interim proceeding)*

*Paragraph 71 of the UNCITRAL MLCBI Guide to Enactment and Interpretation suggests that "proceedings" will include compulsory and voluntary proceedings, corporate or individual, winding-up or reorganisation, and would include proceedings where the debtor retains a measure of control over its assets. In this case, the Bank has been put into compulsory winding-up by the National Bank ("NB"), which is being carried out by the Deposit Guarantee Fund ("DGF"), and the Bank does not retain a measure of control over its assets. It is therefore subject to a proceeding and this element is satisfied.*

#### *2) In a foreign State*

*Clearly, the Bank's liquidation proceeding is being carried out in a state that is foreign to England & Wales, as it is being carried out in the state of Country A. This element is satisfied.*

*3) That is a collective proceeding*

The *UNCITRAL MLCBI Guide to Enactment and Interpretation* at paragraphs 69-72 explains that for recognition to be granted, it must be a collective proceeding because the MLCBI is intended to provide a tool for achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended to be used merely as a collective device for a particular creditor or group of creditors. Paragraph 70 explains that in evaluating whether a given proceeding is collective, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors.

According to the information provided on the liquidation of the Bank, the powers of the liquidator include compiling a list of creditors and seeking to establish their claims, as well as taking over management of the Bank's property, exercising management powers, and recovering its property. This suggests that the proceeding is a collective proceeding designed to deal with all the Bank's assets and liabilities, and all of its creditors, not just a particular creditor or particular group of creditors. This element is therefore satisfied.

*4) That is judicial or administrative*

The proceeding is being carried out by the DGF, a governmental body of Country A, pursuant to the DGF Law. It is therefore an administrative proceeding and so this particular element of the definition is satisfied.

*5) That is being carried out pursuant to a law relating to insolvency*

Paragraph 73 of the *UNCITRAL MLCBI Guide to Enactment and Interpretation* explains that this description ("a law relating to insolvency") is designed to be sufficiently broad to encompass a range of insolvency rules, irrespective of the type of statute or law in which they might be contained, and irrespective of whether that law relates exclusively to insolvency.

In this case, the Law of Country A on Banks and Banking Activity applied to the question as to the classification of the Bank as insolvent, but the DGF Law is the law pursuant to which the proceeding is being carried out, which specifies the powers of the liquidators and sets out the procedure by which the Bank will ultimately be wound up. On that basis, clearly the DGF Law is a law relating to insolvency and so this element is satisfied.

*6) In which the assets and affairs of the debtor Bank are subject to control or supervision by a foreign court*



Article 2(e) defines a "foreign court" as a judicial or other authority competent to control or supervise a foreign proceeding. Paragraph 87 of the UNCITRAL MLCBI Guide to Enactment and Interpretation explains that a foreign proceeding which meets the requirements of Article 2(a) should receive the same treatment irrespective of whether it has been commenced and supervised by a judicial body or an administrative body. Therefore, the definition of "foreign court" also includes non-judicial authorities.

Paragraphs 74 to 76 of the UNCITRAL MLCBI Guide to Enactment and Interpretation explain that the MLCBI does not specify either the level of control or supervision required to satisfy this aspect. These paragraphs explain that it is intended that the control or supervision should be formal in nature, but may be potential rather than actual. Both assets and affairs of the debtor should be subject; it is not enough for merely one or the other to be so subject. Further, control or supervision may be exercised not only directly by the court but also by an insolvency representative, where the insolvency representative is subject to control or supervision by the court. However, the Guide states that mere supervision of an insolvency representative by a licensing authority would not be sufficient.

In this case, the DGF acquired all the powers of a liquidator under the law of Country A when the NB decided to revoke the bank's licence. The appointment was not subject to the approval of a court of Country A and indeed was dealt with by the resolution of the NB to revoke the Bank's licence and resolve that it be liquidated. Articles 3(3) and 3(7) of the DGF Law state that the DGF is an economically independent institution with a separate balance sheet and accounts from the NB and that neither public authorities nor the NB have any right to interfere in the exercise of its functions and powers. There is no suggestion that the DGF is itself subject to the supervision of any court. However, in accordance with Article 2(e), a non-judicial authority can come within the definition of "foreign court" and Article 2(a) is designed to catch proceedings that are supervised by an administrative body. For these reasons, it is likely that this criterion is satisfied.

*7) The proceeding is for the purpose of reorganisation or liquidation*

It is clear that the purpose of this proceeding to withdraw the Bank from the market and to wind down its affairs in a liquidation, so this element is satisfied.

In conclusion, it is likely that the Bank's liquidation comprises a "foreign proceeding" under Article 2(a), given that all seven elements of the definition appear to be satisfied.

**[Excellent response!]**

4.1.2

Article 2(d) defines a "foreign representative" as a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

*The Applicants for recognition are both the DGF and Mrs G, in her capacity as authorised officer of the DGF of Country A in respect of the liquidation of the Bank. The criterion that there be a foreign proceeding, pursuant to the definition in Article 2(a), is already satisfied. [Therefore, a reference to the presumption set forth in article 16(1) MLCBI may be appropriate]*

*Paragraph 86 of the UNCITRAL MLCBI Guide to Enactment and Interpretation explains that Article 2(d) recognises that the foreign representative may either be the person authorised to administer those proceedings, or may simply be the person authorised specifically for the purposes of representing those proceedings. The MLCBI does not specify that the foreign representative must be authorised by the court and so the definition is broad enough to include appointments that might be made by a special agency rather than the court.*

#### *DGF*

*It does not matter that the DGF is not an individual, as Article 2(d) is clear that a foreign representative can be a body or an individual.*

*Pursuant to Article 77 of the LBBA in Country A, DGF automatically becomes the liquidator of the Bank. DGF is therefore authorised to administer the liquidation of the Bank's assets and so would be a "foreign representative" within Article 2(d).*

#### *Mrs G*

*Mrs G was appointed by DGF as one of DGF's authorised persons to whom the powers of DGF as liquidator were delegated under Article 48(3) of the DGF Law. Article 48(3) provides that the authorised person is an employee of DGF, who on behalf of DGF and with the powers provided for or delegated by the DGF performs actions to ensure the bank's withdrawal from the market. In accordance with paragraph 86 of the UNCITRAL MLCBI Guide to Enactment and Interpretation, it does not matter for the purposes of the definition of "foreign representative" that Mrs G was not appointed by a court.*

*DGF delegated all its powers save for the excluded powers, which remain vested in DGF. In particular, DGF delegated all liquidation powers set out in the DGF Law, including the authority to sign all agreements related to the sale of the Bank's assets in the manner prescribed by the DGF Law, save for the power to claim damages from a related party of the Bank, the power to make a claim against a non-banking financial institution that raised money as loans or deposits from individuals, and the power to arrange for the sale of the Bank's assets.*

*Pursuant to Article 35(1) of the DGF Law, Mrs G as authorised officer, is accountable to the DGF for her actions, and may exercise the powers delegated to her by the DGF in pursuance of the Bank's liquidation.*

*This means that Mrs G is appointed to act as a representative of the proceeding in Country A, even if she does not have the full powers to administer the liquidation on behalf of the DGF. As paragraph 86 of the UNCITRAL MLCBI Guide to Enactment and Interpretation explains that Article 2(d) recognises that the foreign representative may either be the person authorised to administer those proceedings, or may simply be the person authorised specifically for the purposes of representing those proceedings. Therefore it does not matter that Mrs G does not have all the powers of a liquidator under the DGF Law; she still qualifies as a "foreign representative" under Article 2(d).*

*In conclusion, both DGF and Mrs G as the Applicants fall within the description of foreign representatives under Article 2(d) of the MLCBI.*

***[Again, a well-reasoned response].***

**\* End of Assessment \***